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November 20, 2012

Ex Parte Filing

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: *Composition of SMS/800, Inc.*, WC Docket No. 12-260

Dear Ms. Dortch:

On November 19, 2012, Tom Fitzgerald and Gina Perini of SMS/800, Inc. (“the Company”), Ann Berkowitz of Verizon, and Melanie Bostwick and I met with Lisa Gelb, Ann Stevens, Michelle Sclater, John Visclosky, and (by telephone) Heather Hendrickson to discuss certain issues related to the Company’s Petition To Change the Composition of SMS/800, Inc., filed in the above-captioned dockets on September 13, 2012.¹ During the meeting, we discussed the reasons why, consistent with the Commission’s rules, the Commission should grant the Company’s request for approval of its plan to assume the role of neutral administrator of the SMS/800 Service Management System (“SMS/800”).

The Company strongly supports the requirement that the SMS/800 administrator satisfy the Commission’s neutrality requirements. Toll-free number assignment can be both highly competitive and involve RespOrgs’ sensitive proprietary data. Rigorous enforcement of neutrality is thus essential to ensure that all segments of the industry have confidence in the administrator. The changes that the Company has proposed to its membership and governance were accordingly designed with the Commission’s neutrality requirements very much in mind. Compliance with the letter and the spirit of neutral administration is and will remain the Company’s first priority.

¹ See Petition To Change the Composition of SMS/800, Inc., CC Docket No. 95-155, WC Docket No. 12-260 (FCC filed Sept. 13, 2012) (“Petition” or “Pet.”).

1. As the Commission has explained, neutral administration of SMS/800 is required by statute and the Commission's rules.² The Commission's rules provide that the SMS/800 administrator must be "impartial and not aligned with any particular telecommunication industry segment"³ and satisfy three more specific requirements. First, the entity may not be an affiliate of any telecommunications service provider or interconnected VoIP provider.⁴ Second, neither the entity nor any of its affiliates may issue a majority of its debt to, or derive a majority of its revenues from, any telecommunications service provider.⁵ Finally, "[n]otwithstanding [these two] neutrality criteria," the entity "may be determined to be or not to be subject to undue influence by parties with a vested interest in the outcome of numbering administration and activities."⁶

As the Commission has explained, these criteria ensure that entities seeking to participate in the telecommunications marketplace obtain timely and efficient access to numbering resources, and that no particular industry segment is favored or disadvantaged.⁷ The criteria also ensure that the administrator remains neutral in order to maintain the trust and confidence of the entities that must submit sensitive information to the administrator in its numbering administration activities.⁸ Finally, the criteria ensure that the administrator is able to comply with its obligations without excessive Commission oversight.⁹

2. Following the changes proposed in the Petition, the Company would meet the regulatory criteria for neutrality, and the Company's service as the SMS/800 administrator would be consistent with the objectives of those criteria.

a. The Company will not be an "affiliate" of any telecommunications service provider or interconnected VoIP provider. An "affiliate" is defined as "a person who controls, is

² See 47 U.S.C. § 251(e)(1) ("The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis."); see also Fifth Report and Order in CC Docket No. 95-155, *Toll Free Service Access Codes*, 15 FCC Rcd 11939, ¶ 16 (2000) ("5th Toll Free Service R&O") (concluding that § 251(e) and the neutrality rules governing the NANPA and the B&C agent apply to toll free number administration).

³ 47 C.F.R. § 52.12(a)(1).

⁴ See *id.* § 52.12(a)(1)(i).

⁵ See *id.* § 52.12(a)(1)(ii).

⁶ *Id.* § 52.12(a)(1)(iii).

⁷ See 5th Toll Free Service R&O ¶ 17.

⁸ See *id.*

⁹ See *id.*

controlled by, or is under the direct or indirect common control with another person.”¹⁰
“Control” is further defined as follows:

(A) An equity interest by stock, partnership (general or limited) interest, joint venture participation, or member interest in the other person [of] ten (10%) percent or more of the total outstanding equity interests in the other person, or

(B) The power to vote ten (10%) percent or more of the securities (by stock, partnership (general or limited) interest, joint venture participation, or member interest) having ordinary voting power for the election of directors, general partner, or management of such other person, or

(C) The power to direct or cause the direction of the management and policies of such other person, whether through the ownership of or right to vote voting rights attributable to the stock, partnership (general or limited) interest, joint venture participation, or member interest of such other person, by contract (including but not limited to stockholder agreement, partnership (general or limited) agreement, joint venture agreement, or operating agreement), or otherwise.¹¹

Following the transition proposed in the Petition, no entity would “control” the Company under the regulatory definition of that term, and the Company therefore would not be an affiliate of any other entity.¹²

First, no entity would own a ten percent or more equity interest in the Company. The Company is structured as a non-profit membership corporation; it has no equity or securities. And no entity would hold more than ten percent of the “member interest[s]” in the Company. As explained in the Petition, membership in the Company would be expanded to include all RespOrgs and SCP Owner/Operators. There are currently several hundred RespOrgs and eight SCP Owner/Operators. Because there would be more than ten members in the Company, no entity would hold a ten percent membership interest, so no entity would “control” the Company under 47 C.F.R. § 52.12(a)(1)(i)(A).

Second, no entity would control the Company under 47 C.F.R. § 52.12(a)(1)(i)(B), because no entity would be able to vote ten percent or more of the Company’s “securities.” As a non-profit membership corporation, the Company does not have “securities,” so this definition of “control” is, by its terms, not applicable to the Company. Moreover, no entity could exercise the kind of “control” proscribed by this provision. No entity would control ten percent or more of

¹⁰ 47 C.F.R. § 52.12(a)(1)(i).

¹¹ *Id.* § 52.12(a)(1)(i)(A)-(C).

¹² The Company itself does not “control” any other entity and therefore could not be deemed an affiliate of a telecommunications service provider or VoIP provider through exercise of such control.

the voting power for election of the Company's directors. As explained in the Petition, the Board is structured to ensure that each industry segment is fairly represented, with three seats reserved for representatives of large and small RespOrgs and SCP Owner/Operators, and two at-large seats elected by the industry as a whole. These industry-representative seats are balanced by the presence of four independent directors and the Company's CEO, each of whom has voting power equal to the other Board members.¹³

Third, no individual entity would have the power to direct the Company's management and policies. The Company's bylaws provide that matters decided by members are to be decided by a majority vote, ensuring that no individual member can make decisions regarding management. Under the proposed restructuring of the Company, the membership would include several hundred RespOrgs and the eight SCP Owner/Operators, any one of whom would have to secure the consent of a majority of the members in order to act.

Nor would any single entity have the ability to direct the Company's management and policies by controlling the Board. As described in the Petition, each of the 12 (and subsequently ten) Board members would have equal voting power, and—with one limited potential exception—no individual entity would be able to hold more than one seat at a time on the Board. The one potential exception to that rule is for an entity that is both a RespOrg and an SCP Owner/Operator; that entity could hold two of the elected seats at any one time. But even in that scenario, having two votes on a ten- or twelve-member Board would not allow for control of the Board's actions and decisions. (Unlike the other two regulatory definitions of "control," the definition in subsection (C) does not contain a ten percent threshold; holding one or two seats on a ten-member Board does not equate to direction or control of that Board.¹⁴)

The Company's organization as a non-profit membership corporation, along with the proposed structure for the Company's new Board, would ensure that no individual entity or individual industry segment would exercise control over the Company or its management. Under these circumstances, the Company will be able to satisfy the first neutrality criterion

¹³ For some of the Board seats, one company might have more than ten percent of the vote for that individual seat. For example, only SCP Owner/Operators will be eligible to vote for the Board member who will represent that industry segment. Currently, there are eight SCP Owner/Operators, meaning that every SCP Owner/Operator will exercise 12.5 percent of the voting power for that seat. Similarly, in the case of the two "at-large" Board seats, RespOrgs will eventually (after the first two board elections) be allotted votes in proportion to the quantity of toll-free numbers they control. (Currently, one RespOrg has more than ten percent of the assigned toll-free numbers.) But this degree of voting power is not the kind of "control" implicated by the regulatory neutrality requirements, and no entity would approach the ability to exercise the "control" over the corporate governance of the Company as whole that would accompany a ten percent voting interest in a for-profit corporation or partnership.

¹⁴ See, e.g., Order, *Request of Lockheed Martin Corporation and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business*, 14 FCC Rcd 19792, ¶ 33 (1999) ("*Warburg Transfer Order*").

because it would not be controlled by any telecommunications service provider or VoIP provider, and therefore would not be an “affiliate” of such a provider.

b. The Company would also meet the second neutrality criterion because it would not “issue a majority of its debt to” or “derive a majority of its revenues from” any telecommunications service provider.¹⁵ As explained above, the Company is a not-for-profit membership corporation; it does not issue debt. The Company will derive “revenues” in connection with the operation of SMS/800 from the user fees paid by RespOrgs and SCP Owner/Operators. No individual company will even approach accounting for a majority of the Company’s revenues. The Company accordingly meets the second neutrality criterion.

c. The Commission should also find that the Company will not be “subject to undue influence by parties with a vested interest in the outcome of numbering administration and activities.”¹⁶ Several factors support a determination that the Company satisfies this neutrality requirement. The Company itself has no vested interest in the outcome of numbering administration and activities, and the Company’s unique structure and operation would prevent any single interested party, including any of the service providers that make up the Company’s membership, from exerting undue influence.

The Commission has already determined that the “uniquely structured” terms of the SMS/800 tariff ensure that toll-free number administration remains neutral. In approving DSMI as the neutral administrator of SMS/800, the Commission found that there was no undue influence because “DSMI may not exercise its discretion to administer toll free number services in a manner inconsistent with the tariff.”¹⁷ The same tariff terms ensuring competitively neutral administration of SMS/800 are still in place, and—as the Commission previously held with respect to DSMI—the Company would have no discretion to administer the SMS/800 service in a manner inconsistent with the tariff.

Other safeguards would further ensure that the Company is not subject to undue influence. Four of the seats on the Company’s Board would be filled by independent directors, who would have no current or recent affiliation with participants in the toll-free industry.¹⁸ The Commission has previously cited the presence of such independent directors as a means of helping to ensure that neutrality obligations are not compromised.¹⁹ Likewise, the presence of the Company’s CEO on the Board serves as an additional safeguard against undue influence by

¹⁵ 47 C.F.R. § 52.12(a)(1)(ii).

¹⁶ *Id.* § 52.12(a)(1)(iii).

¹⁷ 5th Toll Free Service R&O ¶ 24.

¹⁸ *See* Pet. at 8.

¹⁹ *See Warburg Transfer Order* ¶ 32.

other Board members who may be affiliated with telecommunications services providers.²⁰ In its third year, half of the Board's ten seats would be filled by these independent directors and the Company's CEO. Because each Board member has one vote, no measure could pass the Board without the endorsement of at least one unaffiliated director. As described above, the fact that one or two Board seats might be held by representatives of a telecommunications service provider would not render the Company an affiliate of that provider and would not compromise the Company's neutrality. Nonetheless, to the extent there is any concern about such providers influencing the Company's actions through Board representation, the presence of independent directors and Company management would counterbalance any potential influence.

Because the Company would neutrally administer toll-free numbering according to the terms of the SMS/800 Tariff, and because it would be directed by independent management and a balanced Board of Directors, the Commission should determine that the Company would not be subject to undue influence by any party with a vested interest in the outcome of numbering administration and activities.

3. Allowing the Company to administer the SMS/800 service (including the number administration aspect of the service) directly, instead of assigning that role to a third party, would also further the objectives underlying the neutrality requirement. Eliminating an additional contracting party will streamline the provision of SMS/800 service and facilitate "efficient access to numbering resources."²¹ Under the new governance structure proposed above, the Company will be representative of all industry segments, ensuring "that no particular industry segment ... is favored or disadvantaged."²² This same representativeness will give the Company "the trust and confidence"²³ of entities that use the SMS/800 service, because those entities will be members of the Company and represented on its Board. And the restructured Company will be able to "comply with its obligations without extensive and constant Commission oversight."²⁴

²⁰ See *id.* ¶ 33 (noting that the presence of NeuStar's proposed CEO on the Board would further neutrality because "his own success is dependent on the success of NeuStar, which must remain neutral to continue in business").

²¹ *Id.* ¶ 24.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

Marlene H. Dortch, Secretary

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If you have any questions concerning this matter, please contact me at (202) 326-7921.

Sincerely,

A handwritten signature in black ink, appearing to read "Aaron M. Panner". The signature is fluid and cursive, with a long horizontal stroke at the end.

Aaron M. Panner

cc: Lisa Gelb
Ann Stevens
Michelle Sclater
Heather Hendrickson
John Visclosky